

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

DAVID STALHEIM,

Petitioner,

v.

WHATCOM COUNTY,

Respondent.

Case No. 11-2-0001

FINAL DECISION AND ORDER

I. SYNOPSIS

Petitioner challenged Whatcom County's Ordinance 2010-067 adopted on December 7, 2010 establishing a six-month interim ordinance for a one-time extension for land use development regulations. The Board's jurisdiction was challenged by the County as the ordinance expired one day before the Board's Hearing on the Merits. The Board found it had jurisdiction based on five criteria cited by the Supreme Court's findings on jurisdiction. The Board found the County did not violate public process for interim ordinances because one public hearing was held. The Board found that Whatcom County Ordinance 2010-067 failed to be guided by Goal 10 (environment). The Board found the County's environmental review of the proposal failed to protect critical areas and that its environmental review of the proposal did not incorporate SEPA. The Board found inconsistency between the comprehensive plan and development regulations and remanded the matter to the County. The Board entered a determination of invalidity.

II. PROCEDURAL HISTORY

David Stalheim's (Petitioner) Petition for Review challenged Whatcom County's adoption of Ordinance 2010-067 (Ordinance), a six-month temporary measure amending three County codes: County Zoning Code (Title 20), County Land Division Code (Title 21) and County

1 Critical Areas Ordinance (Chapter 16).¹ Petitioner claimed the County action was in conflict
2 with Chapter 36.70A RCW by failing to protect the environment, critical areas and
3 shorelines; failing to ensure consistency between the County's Comprehensive Plan and its
4 development regulations; failing to ensure permits were processed in a timely, fair and
5 predictable manner; failing to include citizens in the planning process; and failing to comply
6 with the State Environmental Policy Act in Chapter 43.21C RCW.
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8 Petitioner moved to supplement the record² and the County objected.³ The Board issued
9 an Order adding to the record the Best Available Science Report; seven short plat
10 applications, maps and related correspondence; the final EIS for the seven short plat
11 applications; and the Gold Star short plat and binding site plan applications.⁴
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14 On June 20, 2011 the Board held a Hearing on the Merits in Bellingham, Washington.
15 Petitioner David Stalheim was present and Royce Buckingham represented Whatcom
16 County. Board Members William Roehl, James McNamara and Nina Carter were present,
17 with Ms. Carter presiding.
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19 III. PRELIMINARY MATTERS

20 At the Hearing on the Merits, pursuant to a request from the Petitioner, the Board took
21 official notice of several Whatcom County ordinances⁵ and supplemented the record with
22 new evidence of substantial assistance to the Board.⁶ At the Hearing, Petitioner requested
23 that Whatcom County Ordinance 2011-013, Adoption of Rural Element, supplement the
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28 ¹ Adopted February 4, 2011

29 ² Petitioner's Motion to Supplement the Record, April 15, 2011 at 8

30 ³ Whatcom County's Objection to Motion to Supplement the Record, April 28, 2011 at 3-4

31 ⁴ Order on Motion to Supplement, May 6, 2011 at 3-4

32 ⁵ Petitioner's Brief Exhibit 3 Whatcom County Ordinance 2005 amending the County's Critical Areas Ordinance with Best Available Science; Exhibit 10 Ordinance 1997-056; Exhibit 12 Whatcom County Ordinance 2010-03; Exhibit 14 Whatcom County Ordinance 1999--086; Exhibit 11 Whatcom County Ordinance 2000-056

⁶ Petitioner's Exhibit 4 (Whatcom County short plat applications); Petitioner's Prehearing Reply Brief, County Executive remarks on the County, Footnote 12 at 4

1 record; Whatcom County objected. The Board allowed Ordinance 2011-013 to supplement
2 the record.

3 4 **IV. BURDEN OF PROOF**

5 Pursuant to RCW 36.70A.320 (1), comprehensive plans and development regulations, and
6 amendments to them, are presumed valid upon adoption.⁷ This presumption creates a high
7 threshold for challengers as the burden is on the petitioners to demonstrate that any action
8 taken by the County is not in compliance with the GMA.⁸

9
10 The Board is charged with adjudicating GMA compliance and, when necessary, invalidating
11 noncompliant plans and development regulations.⁹ The scope of the Board's review is
12 limited to determining whether a County has achieved compliance with the GMA only with
13 respect to those issues presented in a timely petition for review.¹⁰ The GMA directs that the
14 Board, after full consideration of the petition, shall determine whether there is compliance
15 with the requirements of the GMA.¹¹ The Board shall find compliance unless it determines
16 the County's action is clearly erroneous in view of the entire record before the Board and in
17 light of the goals and requirements of the GMA.¹² In order to find the County's action clearly
18 erroneous, the Board must be "left with the firm and definite conviction that a mistake has
19 been committed."¹³
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25 ⁷ RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable
26 development regulations] comprehensive plans and development regulations, and amendments thereto,
27 adopted under this chapter are presumed valid upon adoption.

28 ⁸ RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the
29 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this
30 chapter is not in compliance with the requirements of this chapter.

31 ⁹ RCW 36.70A.280, RCW 36.70A.302

32 ¹⁰ RCW 36.70A.290(1)

¹¹ RCW 36.70A.320(3)

¹² RCW 36.70A.320(3)

¹³ *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe, et al v. WWGMHB*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006)

1 In reviewing the planning decisions of cities and counties, the Board is instructed to
2 recognize “the broad range of discretion that may be exercised by counties and cities” and
3 to “grant deference to counties and cities in how they plan for growth.”¹⁴ However, the
4 County’s actions are not boundless; their actions must be consistent with the goals and
5 requirements of the GMA.¹⁵
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7 Thus, the burden is on the Petitioner to overcome the presumption of validity and
8 demonstrate the challenged action taken by Whatcom County is clearly erroneous in light of
9 the goals and requirements of the GMA.
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11 **V. BOARD JURISDICTION**

12 The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290 (2).
13 The Board also finds Petitioner has standing to appear before the Board, pursuant to RCW
14 36.70A.280 (2).
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17 The Board’s jurisdiction was challenged by the County. Ordinance 2010-067 was a
18 temporary, six-month ordinance adopted on December 7, 2010 amending Whatcom
19 County’s Zoning Code, Land Division Ordinance and the Critical Areas Ordinance, allowing
20 a one-time economic hardship extension of permit expirations and extensions of critical area
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25 ¹⁴ RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be
26 exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the
27 boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements
28 and goals of this chapter. Local comprehensive plans and development regulations require counties and cities
29 to balance priorities and options for action in full consideration of local circumstances. The legislature finds
30 that while this chapter requires local planning to take place within a framework of state goals and
31 requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this
32 chapter, and implementing a county’s or city’s future rests with that community.

¹⁵ *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000)(Local discretion is bounded by the
goals and requirements of the GMA). See also, *Swinomish*, 161 Wn.2d at 423-24. In *Swinomish*, as to the
degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated: The
amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to
give the [jurisdiction’s] actions a “critical review” and is a “more intense standard of review” than the arbitrary
and capricious standard. *Id.* at 435, Fn.8.

1 assessment reports and geologic assessment reports.¹⁶ This Ordinance continued a
2 previous one-time, temporary, six-month ordinance which accomplished the same purpose
3 –extending deadlines for permits or reports under the land division and critical areas
4 ordinances.¹⁷

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6 Permits extensions included those granted under Whatcom County Zoning Code Chapter
7 20.84 (planned unit developments, conditional use permits, variances or administrative use
8 permits); Whatcom County Land Division Code Chapter 21.01 (final short subdivision,
9 exempt land division, subdivision, general or specific binding site plans); and Whatcom
10 County Critical Areas Chapter 16.16.255 and .375 (critical area assessment reports and
11 geological assessment reports). Criteria for filing for an extension included paying a fee,
12 filing a sworn declaration that the work authorized by the land use approval will be delayed
13 as a result of “adverse market conditions or inability to secure financing, and the extension
14 request was for an issued land use approval set to expire between December 5, 2010 and
15 March 1, 2012.”¹⁸ The Ordinance expired on June 19, 2011 – one day before the Board’s
16 Hearing on the Merits – but by its express terms authorized permit or report extension
17 requests to be filed until March 1, 2014. Thus, with the adoption of Ordinance 2010-067,
18 permits or report deadlines were extended for two years, notwithstanding the fact that the
19 Ordinance itself expired within six months.
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23 *Positions of the Parties:*

24 The Ordinance’s Findings of Fact state that, like the rest of the nation, Whatcom County
25 faced a significant economic downturn which affected the construction industry, credit
26 markets, and financing for developers and homeowners.¹⁹ The Ordinance was intended to
27 allow sufficient time for pending applications to remain vested and “weather current market
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¹⁶ Whatcom County Ordinance 2010-067, Exhibit A, Sections 1, 2 and 3.

¹⁷ Petitioner’s Exhibit 14; Whatcom County Ordinance 2010-026 adopted May 11, 2010

¹⁸ Ibid.

¹⁹ Ordinance 2010-067 at 1 Findings of Fact

1 conditions".²⁰ In its brief and at the Hearing on the Merits, the County argued the Board had
2 no jurisdiction over the Ordinance because it expired the day before the Board's Hearing on
3 the Merits.²¹ The County claimed the Board could not invalidate an ordinance that no longer
4 existed nor could the Board invalidate permits issued under an expired ordinance. Finally,
5 the County argued the Petitioner did not establish the County's action was "clearly
6 erroneous."²²
7

8 The Petitioner responded the Board did have jurisdiction because the Ordinance authorized
9 permit and report renewal requests until March 1, 2012 and, if such requests were granted,
10 they would remain valid until 2014.²³ These vested projects or report extensions would not
11 be required to comply with updated requirements for critical areas, shorelines or best
12 available science. If the Board were to agree with the County, then all six-month interim
13 ordinances would be beyond the Board's jurisdiction as such ordinances only remain in
14 effect for six months. The Board is required to issue its final orders no later than six months
15 from the date a petition for review is filed. Thus, interim ordinances would expire before the
16 Board could complete its work.
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19 Petitioner argued this case is within the Board's jurisdiction because of its "continuing and
20 substantial public interest": the people of Whatcom County will "have to live with the results
21 of projects permitted under obsolete, noncompliant laws forever" and the Ordinance
22 expiration date does not eliminate the **effects** of the Ordinance. Petitioner references the
23 Washington Supreme Court *Westerman v. Cary* decision²⁴ which establishes a multi-part
24 test for considering mootness. In *Westerman*, the Washington State Supreme Court found
25 that:
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31 ²⁰ Ibid. at 2

32 ²¹ Respondents Brief at 1

²² Ibid.

²³ Whatcom County Ordinance 2010-067, Section 2 (1)(a)

²⁴ *Westerman v. Cary*, 125 Wn.2d 277 (1994).

1 "It is a general rule that, where only moot questions or abstract propositions are
2 involved, or where the substantial questions involved in the trial court no longer
3 exist, the appeal . . . should be dismissed".

4 A case is moot where "a court can no longer provide effective relief".

5 However, a recognized exception permits an appellate court, at its discretion, to
6 "retain and decide an appeal which has otherwise become moot when it can be
7 said that matters of continuing and substantial public interest are involved".

8 Three factors in particular are determinative: "(1) whether the issue is of a public
9 or private nature; (2) whether an authoritative determination is desirable to
10 provide future guidance to public officers; and (3) whether the issue is likely to
11 recur". A fourth factor may also play a role: "the level of genuine adverseness
12 and the quality of advocacy of the issues". This factor serves to limit review to
13 cases in which a hearing on the merits has occurred.

14 Lastly, the court may consider "the likelihood that the issue will escape review
15 because the facts of the controversy are shortlived".²⁵ (citations omitted)

16 The Board finds that under the *Westerman* test, this appeal is not moot. First, because we
17 are asked to review an ordinance passed by Whatcom County that modifies development
18 regulations which apply to permits issued by the County, it most definitely is of a "public
19 nature". Second, the Board's decision will provide future guidance to public officers in local
20 jurisdictions who may be considering adopting temporary measures with extended
21 effectiveness dates. Thus, "an authoritative determination is desirable to provide future
22 guidance to public officers." Third, from the record the Board notes the County has already
23 adopted this Ordinance twice; on May 25, 2010 the County Council adopted the same,
24 "one-time economic hardship" ordinance embodied in 2010-026.²⁶ Nothing prevents the
25 County from re-adopting this Ordinance a third or fourth time, or indefinitely, in subsequent
26 years as the international and national recession has not yet abated. Thus, this situation
27 may recur if the County decides to extend the "one-time economic hardship" ordinance.
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²⁵ *Westerman v. Cary*, 125 Wn.2d 277, 286-87.

²⁶ Petitioner's Brief, Exhibit 14

1 Fourth, the parties most certainly are at odds and there is a genuine level of adverseness.
2 Fifth, the Board noted during its deliberations that because the Ordinance is no longer in
3 effect (but the policy is still being implemented), absent an exercise of the Board's
4 jurisdiction, the issue will "escape review" because the Ordinance's impacts are not before
5 the public. The Ordinance purports to remain in effect until March 1, 2012 notwithstanding
6 the fact it "expired" on June 19, 2011.
7

8 For the reasons stated above, the Board finds it does have jurisdiction over the subject
9 matter of the petition pursuant to RCW 36.70A.280 (1). When an interim Ordinance amends
10 a development regulation, that development regulation is subject to Board jurisdiction.
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12 VI. DISCUSSION OF THE ISSUES

13 The Challenged Action:

14 As previously stated, Petitioner challenges Ordinance 2010-067 which established a one-
15 time extension for land use approvals. The Ordinance amended three development
16 regulations regarding land use. The issue statements below set forth the facts giving rise to
17 Petitioner's challenge as well as the specific sections of Chapter 36.70A RCW (Growth
18 Management Act) alleged to have been violated by the County's action.
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21 Issue # 1: Environment

22 When Whatcom County amended its development regulations in Ordinance 2010-067,
23 did Whatcom County fail to protect the environment, designated critical areas and
24 shorelines of the state inconsistent with the goals in RCW 36.70A.020 (10), the
25 requirements of RCW 36.70A.060 (2-3), and the requirements of RCW 36.70A.480, and
26 in doing so, also fail to perform its planning activities as required by RCW
27 36.70A.120?
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29 Applicable Laws:

30 **RCW 36.70A.020**

31 (10) Environment. Protect the environment and enhance the state's high quality
32 of life, including air and water quality, and the availability of water.

1
2 **RCW 36.70A.060**

3 (2) Each county and city shall adopt development regulations that protect critical
4 areas that are required to be designated under RCW 36.70A.170. For counties
5 and cities that are required or choose to plan under RCW 36.70A.040, such
6 development regulations shall be adopted on or before September 1, 1991. For
7 the remainder of the counties and cities, such development regulations shall be
8 adopted on or before March 1, 1992.

9 (3) Such counties and cities shall review these designations and development
10 regulations when adopting their comprehensive plans under RCW 36.70A.040
11 and implementing development regulations under RCW 36.70A.120 and **may**
12 **alter** such designations and development regulations to insure
13 consistency.(emphasis added)

14 **RCW 36.70A.480**

15 (1) For shorelines of the state, the goals and policies of the shoreline
16 management act as set forth in RCW 90.58.020 are added as one of the goals of
17 this chapter as set forth in RCW 36.70A.020 without creating an order of priority
18 among the fourteen goals. The goals and policies of a shoreline master program
19 for a county or city approved under chapter 90.58 RCW shall be considered an
20 element of the county or city's comprehensive plan. All other portions of the
21 shoreline master program for a county or city adopted under chapter 90.58 RCW,
22 including use regulations, shall be considered a part of the county or city's
23 development regulations.

24 **RCW 36.70A.120**

25 Each county and city that is required or chooses to plan under RCW 36.70A.040
26 shall perform its activities and make capital budget decisions in conformity with
27 its comprehensive plan.

28 Petitioner failed to support his Issue 1 allegations of violations of RCW 36.70A.120.
29 Consequently, that allegation is deemed abandoned. Petitioner's argument on RCW
30 36.70A.060 (3) is not applicable as the clause "may alter" as used in that statute does not
31 establish a mandatory requirement. While RCW 36.70A.060 (3) does require jurisdictions to
32 review to insure consistency, the requirements to maintain consistency are set forth
elsewhere in the GMA and Issue 1 does not raise claims based on a lack of consistency.
The alleged violations of RCW 36.70A.020 (10), .060(2), and .480 are discussed below.

1 Position of the Parties:

2 The Petitioner summarized GMA requirements to protect the environment and use
3 development regulations to implement the County's Comprehensive Plan.²⁷ Petitioner
4 noted development regulations must apply Best Available Science (BAS) to protect the
5 functions and values of critical areas and must protect shorelines of the state pursuant to
6 RCW 36.70A.060 and .480, respectively. Petitioner contended the County did not apply a
7 "reasoned process – or any process—to include BAS in its adoption of the Ordinance..."²⁸

8
9 The Petitioner noted the current Critical Areas Ordinance, adopted in 2005,²⁹ was amended
10 by Ordinance 2010-067. He argued the County violated the GMA by adopting the
11 amendment without conducting a BAS analysis or including BAS in the record. Examples of
12 this violation were seven short plats filed in 1999 which would remain vested under
13 Ordinance 2010-067 and would avoid review under the current 2005 Critical Areas
14 Ordinance.³⁰

15
16 In addition, Petitioner stated the Ordinance would "extend applications submitted prior to the
17 County's adoption of its Shoreline Management Master Program in 2008."³¹ Petitioner
18 summarized the situation: "The Ordinance allows development applications submitted within
19 the shorelines of the state before August 8, 2008 to rely on the SMP provisions in 1993".³²
20 He argued this created an inconsistency between the County's Shoreline Management Plan
21 (SMP) and its development regulations as the County's SMP now integrates BAS into its
22 shoreline protections.³³

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25 The Petitioner also opined the Ordinance will have a negative effect on Lake Whatcom
26 water quality, the primary Bellingham water source. He offered by way of example the
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30 ²⁷ Petitioner's Brief at 6

31 ²⁸ Ibid. at 7

32 ²⁹ Ordinance 2005-068

³⁰ Ibid. at 9-12

³¹ Ibid. at 12

³² Ibid. at 13

³³ Petitioner's Brief at 13

1 effects of seven short plats on the lake's water quality. In 1997 the Department of Ecology
2 placed the lake on the Federal Clean Water Act 303(d) list because of low oxygen. This
3 listing required the County to clean up and prevent increased pollution to the lake. In 1999,
4 2003 and 2009 the County imposed ever-more restrictive land clearing requirements, and
5 phosphorous and sediment controls on Lake Whatcom.³⁴ Petitioner argued the 1999 short
6 plat examples demonstrated that by granting permit extensions for those projects, they
7 would not be required to comply with the most recent County restrictions on water pollution,
8 but only meet those water quality requirements in effect in 1993. This inconsistency would
9 result in harm to the environment.
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11
12 Petitioner stated the County failed to address the lack of BAS analysis in adoption of the
13 Ordinance. Furthermore, the County did not analyze or correct the conflict between the
14 Shoreline Management Act and the Ordinance nor the potential of impaired water quality
15 from development of short plat applications. Rather, the Petitioner claimed, the County's
16 argument was that it used its judgment, authority and discretion to address a serious
17 economic emergency – the 2007 economic crash of the housing market and tightening
18 credit markets.³⁵
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21 From the County's perspective, it stated the Ordinance was adopted to assist development
22 that would have occurred anyway, but for the crash.³⁶ The County argued the environment
23 would not be harmed any more than it would have been at the time original permits were
24 issued. The County's argument is that maintaining the *status quo* does not create an
25 environmental harm.³⁷ The County also stated the Petitioner did not cite new "major
26 environmental legislation that has become effective since the date of the ordinance or will
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32 ³⁴ Petitioner Brief at 15

³⁵ Respondent's Brief at 7

³⁶ Ibid. at 8

³⁷ Ibid. at 9

1 become effective within the two year extension period.”³⁸ Finally, the County stated the
2 GMA goals for housing, economic development and property rights were the guiding
3 principles in adopting the Ordinance, not the GMA environmental goal.
4

5 The County concluded that the Petitioner, per the standard of proof, must show the
6 County’s decision was “clearly erroneous” in light of all the goals, not just (10).” (emphasis
7 from County’s brief.)³⁹ In this case, the County used its discretion to “balance multiple
8 goals” in light of a dire economic situation. The County also observes the Petitioner failed to
9 address goals 4, 5, and 6 and therefore cannot request invalidity related to those goals.⁴⁰
10

11 Board Analysis and Discussion:
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13 In reviewing the County’s argument that the Ordinance was fashioned to address the
14 current economic crisis, the Board was struck by the examples of applications which could
15 be renewed under the Ordinance. The original dates for many applications were from the
16 1990’s into early 2000. The fact that a project has been unable to obtain financing for over
17 fifteen years is not a basis for non-compliance with the GMA.
18

19 For the past 15 years, the County has steadily improved and changed its development
20 regulations to implement the latest state or federal environmental legislative requirements.
21 Since the 1990’s, the County adopted new environmental requirements in its
22 Comprehensive Plan, Shoreline Management Plan and development regulations. When
23 comparing the environmental standards in effect in the 1990s with the current regulations,
24 the Board observed there are significant differences in environmental protection. Most
25 notable are the Critical Area Ordinance requirements for critical area assessments,
26 geological assessment reports and the inclusion of BAS in developing policies and
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³⁸ Ibid. at 10

³⁹ Ibid. at 11

⁴⁰ Ibid. at 11

1 regulations⁴¹ to protect the functions and values of critical areas. The Board also noted the
2 County's CAO has been incorporated into its SMP with the result that BAS requirements
3 apply to all of the County's shorelines of the state.⁴² Thus, permits issued for SMA critical
4 areas would also be required to apply BAS as are the non-SMA critical areas.

5 RCW 36.70A.480(4) Shoreline master programs shall provide a level of
6 protection to critical areas located within shorelines of the state that assures no
7 net loss of shoreline ecological functions necessary to sustain shoreline natural
8 resources as defined by department of ecology guidelines adopted pursuant to
9 RCW 90.58.060.

10 Finally, the County's argument that no further environmental harm would result than what
11 would have happened under prior regulations does not meet the intent of the GMA. If this
12 reasoning were applied elsewhere, changes to improve other laws (e.g. forest practices,
13 salmon recovery, water quality, water rights) would be placed on hold until such time as the
14 economy recovers. As noted above, the Ordinance allowed out-of-date development
15 standards to stay in effect without applying the critical areas assessment required by the
16 County's current codes.

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19 The Board finds the Petitioner has met his burden of proof to establish the County violated
20 RCW 36.70A.060 (2) and .480 as the Ordinance fails to protect critical areas; the mandate
21 to protect critical areas incorporates the requirements of RCW 36.70A.172 to include the
22 application of Best Available Science. In addition, the County's SMP incorporates its CAO
23 which again triggers the required application of BAS. Finally, the Board finds the County
24 was not guided by GMA Goal 10 due to its failure to incorporate BAS.
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26 **Issue #2: Internal Consistency**

27 **When Whatcom County amended its development regulations in Ordinance 2010-067,**
28 **did Whatcom County fail to ensure the development regulations were consistent with**
29 _____
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32 ⁴¹ Petitioner's Brief, Exh. 9, WCC 2005-068 at 2, # 6

⁴² See *CRSP and Ronald T. Jepson v. Whatcom County and DOE*, WWGMHB Case No. 08-2-0031, pgs 15-
16

1 and implement the Comprehensive Plan, including but not limited to Land Use
2 Element policies 2M-5 and 11K-2, and Environmental Element policies 11G-10, 11K-4
3 and Action Items 55 and 58, as required by RCW 36.70A.040(3)(d), RCW
4 36.70A.130(1)(d), and WAC 365-196-500?

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6 Applicable Laws:

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8 **RCW 36.70A.040 (in relevant part)**

9 (3)(d) ... the county and each city located within the county shall adopt a
10 comprehensive plan under this chapter and development regulations that are
11 consistent with and implement the comprehensive plan on or before July 1,
12 1994....

13 **RCW 36.70A.130**

14 (1)(d) Any amendment of or revision to a comprehensive land use plan shall
15 conform to this chapter. ***Any amendment of or revision to development
16 regulations shall be consistent with and implement the comprehensive
17 plan.***

18 **WAC 365-196-500 (in relevant part)**

- 19 (1) Comprehensive plans must be internally consistent. This requirement means
20 that differing parts of the comprehensive plan must fit together so that no one
21 feature precludes the achievement of any other.
22 (2) Use of compatible assumptions. A county or city must use compatible
23 assumptions in different aspects of the plan...
24 (3) The development regulations must be internally consistent and be consistent
25 with and implement the comprehensive plan.
26 (4) Consistency review. Each comprehensive plan should provide mechanisms
27 for ongoing review of its implementation and adjustment of its terms
28 whenever internal conflicts become apparent. ***At a minimum, any
29 amendment to the comprehensive plan or development regulations
30 must be reviewed for consistency... (emphasis added)***

31 **January 2010 Chapter Two - Land Use ** Urban Growth Areas**
32 **Whatcom County Comprehensive Plan**
Fish and Wildlife

Whatcom County has historically enjoyed abundant and diverse fish and wildlife
populations. However, the combined effects of habitat reduction or degradation,
fish harvest, hydropower development, hatchery management practices, and
variations in natural conditions are now causing the decline of some of these
populations. Maintaining healthy fish and wildlife populations is a vital goal in

maintaining the quality of life in Whatcom County. Chapter 11: Environment, contains additional discussion of fish and wildlife issues, as well as goals and policies regarding fish and wildlife habitat protection and management.

GOAL 2M: Protect and encourage restoration of habitat for fish and wildlife populations.

Policy 2M-5: Require subdivisions and short plats to be designated in a manner to ***protect fish habitat and water quality*** when a fish bearing stream or river passes through the site. (emphasis added)

GOAL 11K: Conserve and enhance important wetlands.

Policy 11K-2: Develop and adopt criteria ***to identify and evaluate wetland functions that meet the Best Available Science*** standard and that are consistent with state and federal guidelines. (emphasis added)

Policy 11K-4: Encourage land development that ***avoids or mitigates wetland impact***. Impacts to important wetlands should be contingent upon full mitigation measures that equitably compensate for wetlands impacts, on a case by case basis. Strongly discourage alteration of land that results in the degradation of significant wetlands. (emphasis added)

GOAL 11G: Protect water resources and natural drainage systems by controlling the quality and quantity of stormwater runoff.

Policy 11G-10: Develop and administer regulations and incentives such that there is no net loss of ecological functions and values of wetlands and fish and wildlife habitats.

Environmental Management Program Development

Action Item 55. Determine ***appropriate stream and river buffer widths, based upon best available science*** that will optimize fish and wildlife habitat and water quality. (emphasis added)

Action Item 58. Amend the Critical Areas Ordinance to protect threatened and endangered species, consistent with RCW 36.70A.172, which calls for giving special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries, and Department of Ecology rules ***relating to Best Available Science (WAC 365-195, Part IX)***. (emphasis added)

Position of the Parties:

In his issue statement Petitioner claims that the County violated RCW 36.70A.040 (3)(d) and RCW 36.70A.130 because it failed to ensure that development regulations are consistent

1 with and implement comprehensive plans and, at a minimum, if regulations are amended,
2 they must be reviewed for consistency.⁴³ Petitioner argued the County failed to complete an
3 analysis or determine whether development regulations implemented or were consistent
4 with its comprehensive plan. The Plan's goals, policies and action items (listed above)
5 require application of best available science and wetland mitigation. Petitioner could not
6 find an analysis by the County showing how the challenged Ordinance would meet these
7 goals, plans and action items.⁴⁴ Petitioner compared the Ordinance with the
8 Comprehensive Plan and alleged there are inconsistencies between the County's policies to
9 protect critical areas and the land use permits allowed to remain vested under the
10 Ordinance. As in Issue #1, Petitioner argued allowing decade old permits to continue for
11 another 2 years without applying BAS and the requirements in the Comprehensive Plan is
12 inconsistent with the GMA. "The Ordinance extended the vested status of applications that
13 may now proceed without complying with measures required to protect fish habitat and
14 water quality...stream and buffers consistent with BAS...without protecting critical areas."⁴⁵
15
16 The County's response was minimal stating the Petitioner failed to show how the County
17 erred in adopting the Ordinance. Instead, the County stated it was the Petitioner's
18 responsibility to analyze the "basic purpose behind the legislation".⁴⁶ The County repeated
19 that applications were already vested beyond new regulations.⁴⁷
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23 *Board Analysis and Discussion:*

24 Petitioner claimed a violation of RCW 36.70A.040 (3); however, the Board notes this law
25 applied to the initial adoption of GMA comprehensive plans and development regulations
26 and does not apply in this case. Rather, it is RCW 36.70A.130 (1)(d) which requires
27 consistency when amending development regulations. Petitioner also claimed a violation of
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31 ⁴³ Petitioner's Brief at 16

32 ⁴⁴ Petitioner's Brief at 16

⁴⁵ Ibid. at 17

⁴⁶ County's response at 11

⁴⁷ Ibid. at 11

1 WAC 365-196-500. However that rule does not establish a requirement. Chapter 365-196
2 WAC merely sets forth procedural criteria to assist jurisdictions in adopting comprehensive
3 plans and development regulations that meet the goals and requirements of the GMA.
4

5 Petitioner also argues the County failed to complete any analysis to insure consistency
6 between the Comprehensive Plan and the amended development regulations. Whether the
7 County conducted a review to insure consistency is not the question. Rather, the key issue
8 is whether the adopted amendments are or are not in fact consistent.
9

10 On the other hand, it appears clear to the Board that there is an inconsistency between
11 Comprehensive Plan Action Item 58 and the effect of the Ordinance. Action Item 58
12 requires the County to amend its CAO consistent with RCW 36.70A.172 (the BAS
13 application requirement) to preserve or enhance anadromous fisheries. It is clear the
14 Ordinance, which included amendments to the CAO, was adopted without application of
15 BAS. The Board finds the Ordinance is not consistent with Action item 58 thus violating
16 RCW 36.70A.130 (d). For the remaining goals, policies, and action items the Board finds
17 the Petitioner did not sufficiently analyze and brief the Board on alleged inconsistencies
18 between the Comprehensive Plan and the development regulation amendments adopted
19 with the Ordinance or that no inconsistencies exist.
20
21

22 Issue #3 Citizen Involvement

23 **When Whatcom County amended its development regulations in Ordinance 2010-067,**
24 **did Whatcom County fail to ensure that permits are processed in a timely and fair**
25 **manner to ensure predictability, discouraging the involvement of citizens in the**
26 **planning process inconsistent with RCW 36.70A.020(7) and (11) and RCW**
27 **36.70A.390?**
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1 Applicable Laws:

2 **RCW 36.70A.020**

3 (7) Permits. Applications for both state and local government permits should be
4 processed in a timely and fair manner **to ensure predictability.** (emphasis
5 added)

6 (11) Citizen participation and coordination. Encourage the **involvement of**
7 **citizens** in the planning process and ensure coordination between communities
8 and jurisdictions to reconcile conflicts. (emphasis added)

9 **RCW 36.70A.390 (in relevant part)**

10 A county or city governing body that adopts... interim zoning ordinance... without
11 holding a public hearing on the proposed... interim zoning ordinance ...shall hold
12 a public hearing on the adopted ... interim zoning ordinance ... within at least
13 sixty days of its adoption, whether or not the governing body received a
14 recommendation on the matter from the planning commission or department.

15 If the governing body does not adopt findings of fact justifying its action before
16 this hearing, then the governing body shall do so immediately after this public
17 hearing.

18 A[n] interim zoning ordinance ... adopted under this section may be effective for
19 not longer than six months, but may be effective for up to one year **if a work**
20 **plan is developed for related studies providing for such a longer period.**

21 A[n]... interim zoning ordinance ... may be renewed for one or more six-month
22 periods if a subsequent public hearing is held and findings of fact are made prior
23 to each renewal. (emphasis added)

24 Position of the Parties:

25 Petitioner argued the County failed to be guided by GMA Goals 7 and 11 in adopting
26 Ordinance 2010-067. The two GMA Goals require local governments to process “permits in
27 a timely and fair manner to ensure predictability” and to “encourage the involvement of
28 citizens in the planning process”.⁴⁸ Petitioner explained that in 2005, when the County
29 amended its Critical Areas Ordinance, the County involved citizens through planning
30 commission meetings, public hearings, and open public testimony at County Council
31
32

⁴⁸ RCW 36.70A.020 (7) (Permits) and (11) (Citizen Involvement)
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1 hearings. At the end of the process, there was a “settled expectation”⁴⁹ about what the
2 public can rely upon for critical areas and permitting procedures. Citizens trusted the long-
3 standing public involvement process as the new critical areas ordinance was adopted in
4 2005.

5
6 Petitioner argued Ordinance 2010-067 allowed permit holders to circumvent the “settled
7 expectations” from the 2005 public involvement process. According to Petitioner, the 2005
8 public expectations held that when a permit was issued, and the project was not completed
9 within a specified timeframe, the permit holder must – at the end of the original permit
10 timeline -- reapply under up-to-date county codes. Petitioner explained there may be an
11 exception to this rule in the case of “temporary protective measures” designed to “preserve
12 the status quo” and that are indeed “transitory”. Then, circumventing ordinances might be
13 acceptable. But, in this case, when permit extensions have been granted on permits
14 originally filed in the 1990’s, this stretches beyond the “transitory” nature of interim
15 ordinances that are intended to have a six month duration. Petitioner claims if the County
16 desired to extend permits, it should have involved Whatcom residents through more
17 extensive public involvement. Petitioner claims the public did not have opportunities to
18 discuss timeliness or predictability of issuing permits when the interim, challenged
19 Ordinance was adopted.
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23 The County’s response harkens back to their defense of Issue 2: the Petitioner did not
24 address the purpose of the Ordinance. That purpose was to “address an unpredicted
25 disaster in the housing and development markets, and to help return the local development
26 markets to status quo by providing extensions for projects that otherwise would [not] have
27 expired.”⁵⁰ (*sic*) The County argued an interim ordinance is exactly what the County should
28 do to address emergencies and public involvement requirements were met when they
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⁴⁹ Petitioner’s Prehearing Brief at 21

⁵⁰ Brief of Respondent at 12

1 adopted the interim Ordinance. The County disputed Petitioner's reference to the first
2 ordinance allowing permit extensions because that ordinance expired and was not
3 challenged. Suggesting the County "somehow knew it would pass a second interim
4 ordinance and should have passed a "regular ordinance" at the outset" ⁵¹ was mere
5 speculation about the County's actions and was not a valid basis for argument. Lastly, the
6 County explained it did hold the required public hearing for interim ordinances.
7

8 Board Analysis and Discussion:
9

10 Upon reviewing the record and applicable laws, the Board finds the County did hold the
11 hearing required for adoption of an interim ordinance. Under RCW 36.70A.390 local
12 governments must:

13 "...hold a public hearing on the adopted ... interim zoning ordinance ... within at
14 least sixty days of its adoption, whether or not the governing body received a
15 recommendation on the matter from the planning commission or department."

16 Although the County did not refer the interim Ordinance to its Planning Commission, the
17 statute does not require that step. However, RCW 36.70A.390 does require the County to
18 develop a work plan if the interim ordinance is intended to be in effect for more than six
19 months. While the Ordinance states on its face it is in effect for only six months, it also
20 purports to allow permit extension requests to be filed for up to two years. The Board
21 questions how an ordinance which has expired can possibly continue to authorize such
22 applications following its expiration date. If it remains effective, the County was required to
23 develop a work plan, something for which it failed to make provision.
24

25 RCW 36.70A.390: "A[n] interim zoning ordinance ... adopted under this section
26 may be effective for not longer than six months, but may be effective for up to
27 one year if a work plan is developed for related studies providing for such a
28 longer period."

29 On the other hand, if the Ordinance is no longer in effect due to the expiration of the six
30 month period, no such work plan would be required. While the Board has no jurisdiction to
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1 address this obvious conflict between the stated effective period of the Ordinance and the
2 purported two year "continued effectiveness", it does have jurisdiction to address
3 compliance with RCW 36.70A.390. An interim zoning ordinance may not, under that
4 statute, remain in effect for more than one year. The Ordinance on its face is in violation of
5 that requirement. Furthermore, any such interim ordinance may only remain in effect for six
6 months without provisions having been made for a work plan. The challenged Ordinance
7 includes no such provision, again in violation of RCW 36.70A.390. The Petitioner has met
8 his burden of proof to establish a violation of RCW 36.70A.390.
9

10
11 In regards to Goal 7 (Permits), the Petitioner argues in adopting the challenged interim
12 Ordinance the County reversed what had been "settled agreements" that permits would be
13 reviewed against BAS contained in the CAO. Thus, when the County adopted the
14 Ordinance, it created a mechanism by which older, vested projects could remain vested for
15 another two years thus by-passing that public expectation. However, a County has the
16 ability to adopt ordinances (interim or permanent) which may contradict long-held public
17 expectations and the public may be incensed by their action, but the county legislative body
18 is nevertheless entitled to do so when they follow the required public procedures. The
19 Board cannot find the County was not guided by Goal 7 to process permits in a timely
20 manner. The County simply changed its permitting process through an interim ordinance
21 and followed all required public procedures for that ordinance.
22
23

24 In regards to Goal 11 (Citizen Involvement), the County held a public hearing within 60 days
25 of initially adopting the interim ordinance. The Board finds no violation of the citizen
26 involvement goal.
27

28 Therefore, the Board finds the Petitioner has met his burden of proof to establish a violation
29 of RCW 36.70A.390 as the Ordinance purports to apply for a period in excess of six months.
30 If it is effective for longer than that period of time, the County was required to develop a
31 work plan. On the other hand, the Board cannot conclude the County failed to be guided by
32 RCW 36.70A.020(7) and RCW 36.70A.020(11).

1 **Issue #4: State Environmental Policy Act**

2 **When Whatcom County amended its development regulations in Ordinance 2010-067,**
3 **did Whatcom County fail to comply with the procedural requirements of the State**
4 **Environmental Policy Act, RCW 43.21C and WAC 197-11?**

5
6 **Applicable Laws:**

7
8 **RCW 43.21C.030 (in relevant part)**

9 The legislature authorizes and directs that, to the fullest extent possible: ...(2) all
10 branches of government of this state, including state agencies, municipal and
11 public corporations, and counties shall:

12 (a) Utilize a systematic, interdisciplinary approach which will insure the integrated
13 use of the natural and social sciences and the environmental design arts in
14 planning and in decision making which may have an impact on the environment;

15 (b) Identify and develop methods and procedures, in consultation with the
16 department of ecology and the ecological commission, which will insure that
17 ***presently unquantified environmental amenities and values will be given***
18 ***appropriate consideration in decision making*** along with economic and
19 technical considerations;

20 (c) Include in ***every recommendation or report on proposals for legislation***
21 and other major actions significantly affecting the quality of the environment, a
22 ***detailed statement by the responsible official*** on: (i) the environmental impact
23 of the proposed action; (ii) any adverse environmental effects which cannot be
24 avoided should the proposal be implemented; (iii) alternatives to the proposed
25 action; (iv) the relationship between local short-term uses of the environment and
26 the maintenance and enhancement of long-term productivity; and (v) any
27 irreversible and irretrievable commitments of resources which would be involved
28 in the proposed action should it be implemented...(emphasis added)

29 **WAC 197-11-030 (in relevant part)**

30 (1) The policies and goals set forth in SEPA are supplementary to existing
31 agency authority.
32 (2) Agencies shall to the fullest extent possible:

(c) Prepare environmental documents that are concise, clear, and to the point, and are supported by evidence that the necessary environmental analyses have been made.

1 (d) Initiate the SEPA process early in conjunction with other agency operations to
2 avoid delay and duplication.

3 (e) **Integrate the requirements of SEPA with existing agency planning** and
4 licensing procedures and practices, so that such procedures run concurrently
5 rather than consecutively.

6 (f) Encourage public involvement in decisions that significantly affect
7 environmental quality...(emphasis added)

8 **WAC 197-11-800 Categorical Exemptions**

9 (19) Procedural actions. The proposal or adoption of legislation, rules,
10 regulations, resolutions or ordinances, or of any plan or program relating solely to
11 governmental procedures, **and containing no substantive standards**
12 **respecting use or modification of the environment shall be exempt.** Agency
13 SEPA procedures shall be exempt. (emphasis added)

14 *Position of the Parties:*

15 Petitioner argued Ordinance 2010-067 was “an action” as defined by SEPA and was not
16 categorically exempt from SEPA. He stated such an action requires a SEPA threshold
17 determination of environmental effects.⁵² Petitioner claimed the County made no reference
18 to SEPA in its “Findings of Fact and Reasons for Action” in the challenged Ordinance. As a
19 result, Petitioner argued, the County should be found in violation of SEPA and thus the
20 Ordinance should be found invalid.

21
22 The County responded Ordinance 2010-067 extended a deadline for two years and that
23 such extensions are “merely procedural and exempt under WAC 197-11-800(19).”⁵³ The
24 County stated the Ordinance did not amend “substantive standards respecting use or
25 modifications of the environment”⁵⁴ and thus, the challenged Ordinance was exempt from
26 SEPA. Lastly, the County claimed the Petitioner was required to address this issue in its
27 opening brief, but did not. In response, Petitioner noted that projects vested under the
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⁵² Petitioner’s Brief at 24

⁵³ County’s Brief at 13

⁵⁴ WAC 197-11-800(19)

1 Ordinance will be granted extensions for two years and “for any terms [and] conditions...” of
2 their original permit.⁵⁵ The Ordinance allowed projects to be built, and the environment to
3 be impacted, using antiquated standards which were superseded by more recent County
4 Comprehensive Plan changes and development regulations.⁵⁶ Petitioner argued the
5 Ordinance “...does not merely govern the ‘procedures’ by which permits will be issued; it
6 determines the substantive development standards.”⁵⁷
7

8 Board Analysis and Discussion:
9

10 The State Environmental Policy Act (SEPA) requires all government agencies to consider
11 the environmental effects of a proposed action, together with alternatives to the proposed
12 action.⁵⁸ The disclosure of environmental impact information to the county decision-makers
13 and to the public promotes the policy of fully informed decision-making by government
14 bodies and better opportunities for meaningful public participation.⁵⁹
15

16 Thus, when a county amends development regulations as it did with Ordinance 2010-067, a
17 detailed and comprehensive SEPA environmental review was required.⁶⁰ SEPA is to
18 function “as an environmental full disclosure law”,⁶¹ and the County must demonstrate
19 environmental impacts were considered in a manner sufficient to show “compliance with the
20 procedural requirements of SEPA.”⁶² Although the County decision is afforded substantial
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25 ⁵⁵ Petitioner’s Reply Brief at 5-6 and at 14

26 ⁵⁶ Petitioner’s Reply Brief at 14

27 ⁵⁷ Ibid. at 15

28 ⁵⁸ RCW 43.21C.030(2)(c) Include in every recommendation or report on proposals for legislation and other
29 major actions significantly affecting the quality of the environment, a detailed statement by the responsible
30 official on: (i) the environmental impact of the proposed action; (ii) any adverse environmental effects which
31 cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the
32 relationship between local short-term uses of the environment and the maintenance and enhancement of long-
term productivity; and v) any irreversible and irretrievable commitments of resources which would be involved
in the proposed action should it be implemented

⁵⁹ RCW 43.21C.030; RCW 36.70A.035; *Norway Hill Preservation & Protection Assn. v. King County*, 87 Wn.
2d 267 (1976)

⁶⁰ WAC 197-11-704(b)(ii)

⁶¹ *Moss v. Bellingham*, 109 Wn. App. 6 (2001)

⁶² *Sisley v. San Juan County*, 89 Wn.2d 78, 64, 569 P.2d 712 (1977)

1 weight,⁶³ environmental documents prepared under SEPA require the consideration of
2 "environmental" impacts with attention to impacts that are likely, not merely speculative,⁶⁴
3 and "shall carefully consider the range of probable impacts, including short-term and long-
4 term effects."⁶⁵

5
6 In *King County v. Washington State Boundary Review Board for King County*, the Supreme
7 Court recognized the purpose of SEPA is "to provide consideration of environmental factors
8 at the earliest possible stage to allow decisions to be based on complete disclosure of
9 environmental consequences,"⁶⁶ and is designed to provide agencies environmental
10 information *prior to making decisions, not after they are made.*⁶⁷

11
12 A SEPA Threshold Determination is reviewed under the "clearly erroneous" standard.
13 When applying this standard, the Board must determine whether substantial evidence
14 supports the decision, and the Board must consider the public policy and environmental
15 values of SEPA.⁶⁸ The County must demonstrate that it actually considered relevant
16 environmental factors before reaching a decision, and the record must demonstrate the
17 County adequately considered the environmental factors in a manner sufficient to be *prima*
18 *facie* compliance with the procedural dictates of SEPA.⁶⁹

19
20
21 In the present case, no SEPA Threshold Determination was completed prior to the County's
22 adoption of Ordinance 2010-067 because the County believed its action was categorically
23 exempt. In reviewing the SEPA exemption categories, the Board finds WAC 197-11-
24 800(19) allows categorical exemptions for procedural actions, but not if they contain
25 "substantive standards respecting...the environment." Ordinance 2010-067 continues land
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29 ⁶³ RCW 43.21C.090

30 ⁶⁴ WAC 197-11-060(4)(a)

31 ⁶⁵ WAC 197-11-060(4)(c)

32 ⁶⁶ *King County v. Washington State Boundary Review Board for King County*, 122 Wn2d 648, 664, 860 P.2d 1024 (1993). See also, *Lasilla v. Wenatchee*, 89 Wn. 2d 804 (1978).

⁶⁷ Id.

⁶⁸ *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718 (2002).

⁶⁹ Id.

1 development permits which will impact the environment. The Ordinance amends the
2 County's Zoning Code, Land Division Code, and the Critical Areas Ordinance all of which
3 have considerable impact on and are specifically promulgated to manage impacts on the
4 environment. Without conducting a SEPA Threshold Determination prior to adoption of the
5 Ordinance, the Board finds the County failed to comply with RCW 43.21C.030 (2).
6

7 8 VII. INVALIDITY

9 Issue 4 requests a Determination of Invalidity and, as requested in Petitioner's Brief:

10 **Petitioner also requests that the Board find that Whatcom County failed to**
11 **comply with the procedural requirements of the State Environmental Policy**
12 **Act, RCW 43.21C and WAC 197-11. Because adoption of the Ordinance**
13 **2010-067 was "clearly erroneous", the Ordinance is invalid and the entire**
14 **process must begin at the point where SEPA review was required.⁷⁰**

15 Applicable Law:

16 Pursuant to RCW 36.70A.302, the Board has the authority to invalidate all or part of a
17 development regulation. RCW 36.70A.302(1) provides:

18 A board may determine that part or all of a comprehensive plan or development
19 regulation are invalid if the board:

20 (a) Makes a finding of noncompliance and issues an order of remand under
21 RCW 36.70A.300;

22 (b) Includes in the final order a determination, supported by findings of fact
23 and conclusions of law, that the continued validity of part or parts of the plan or
24 regulation would substantially interfere with the fulfillment of the goals of this
25 chapter; and

26 (c) Specifies in the final order the particular part or parts of the plan or
27 regulation that are determined to be invalid, and the reasons for their invalidity.
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⁷⁰ Petitioner's Prehearing Brief at 27
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1 Positions of the Parties:

2 Petitioner argues the County's lack of GMA compliance warrants a finding of invalidity
3 under RCW 36.70A.302 as the Ordinance's continued validity would substantially interfere
4 with fulfillment of the goals of the GMA, in particular Goals 7 (processing permits), 10
5 (environment), 11 (citizen participation) and 14 (Shoreline Management Act).⁷¹
6

7 Goal 10 is tied by the Petitioner to the County's lack of protection for the environment
8 through the Ordinance.⁷² Finally, invalidity is also requested by Petitioner based on the
9 alleged failure to comply with SEPA.⁷³
10

11 The County argues invalidity is not warranted as the Board does not have jurisdiction and
12 the County needed to meet an emergency to stabilize development.⁷⁴
13

14 Board Analysis and Findings:

15 Invalidity is authorized only after the Board has made a finding of non-compliance and is
16 based on a determination that the challenged action, in whole or in part, would substantially
17 interfere with the fulfillment of the goals of the GMA. The Board has previously concluded
18 the Petitioner met his burden of proof to establish the County violated RCW 36.70A.060(2)
19 and RCW 36.70A.480 as the Ordinance, by failing to incorporate Best Available Science,
20 fails to protect critical areas. The Board also concluded the County failed to comply with
21 RCW 43.21C.030 (2).
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24 With the exception of Goal 10, the Board does not find that Petitioner has demonstrated that
25 the County's Ordinance substantially interferes with the goals of the GMA. Goal 10 of the
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31 ⁷¹ Petitioner's Brief at 27.

32 ⁷² Ibid at 27.

⁷³ Ibid.

⁷⁴ County Brief at 14

1 GMA states: "Protect the environment and enhance the state's high quality of life, including
2 air and water quality, and the availability of water."⁷⁵

3
4 The Board finds that the County failed to complete a SEPA threshold determination prior to
5 the adoption of Ordinance 2010-067. The Board finds that the Legislature has determined
6 that in designating and protecting critical areas under the GMA, counties and cities shall
7 include the best available science in developing policies and development regulations to
8 protect the functions and values of critical areas.⁷⁶

9
10 The Board also finds that the County failed to include Best Available Science in developing
11 the policies and development regulations amended by this Ordinance.

12
13 The Board concludes the County was not guided by GMA Goal 10 in its actions. The Board
14 further concludes that the continued validity of Ordinance 2010-067 substantially interferes
15 with the fulfillment of Goal 10 of the GMA. Consequently, the Board invalidates the
16 Ordinance.

17 18 19 **VIII. ORDER**

20 Based on the foregoing, the Board determines it does have jurisdiction over the subject
21 matter of the petition pursuant to RCW 36.70A.280 (1). The Board finds Whatcom County's
22 adoption of Ordinance 2010-067 failed to protect the environment, critical areas and
23 shorelines and was not consistent with the County's Comprehensive Plan thus violating
24 RCW 36.70A.060(2); RCW 36.70A.130(1)(d); RCW 36.70A.390 and RCW 36.70A.480. By
25 failing to complete a SEPA threshold determination for the Ordinance, the Board finds the
26 County failed to comply with RCW 43.21C.030 (2). The Board finds the County action was
27 not guided by GMA Goal 10.
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⁷⁵ RCW 36.70A.020(10).

⁷⁶ See, RCW 36.70A.172(1).

1 Thus, the Board finds and concludes that Whatcom County failed to comply with the Growth
2 Management Act and the State Environmental Policy Act and **REMANDS** Ordinance 2010-
3 067 for compliance with the GMA and SEPA pursuant to this decision within 90 days, to
4 coincide with the schedule for compliance set below. The Board further issues a
5 **DETERMINATION OF INVALIDITY** as to Ordinance 2010-067 in that it substantially
6 interferes with the fulfillment of Goal 10 of the GMA.
7

8 The following schedule for compliance, briefing and hearing shall apply:
9

10 Compliance Due on identified areas of	October 31, 2011
11 noncompliance	
12 Compliance Report/Statement of Actions Taken	November 14, 2011
13 to Comply and Index to Compliance Record	
14 Objections to a Finding of Compliance	November 28, 2011
15 Response to Objections	December 7, 2011
16 Telephonic Compliance Hearing	December 16, 2011
17 (360) 407-3780, Pin 246415#	10:00 a.m.

18 Dated this 2nd day of August, 2011
19

20 _____
21 Nina Carter, Board Member
22

23 _____
24 James McNamara, Board Member
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26 _____
27 William Roehl, Board Member
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1 Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party
2 files a motion for reconsideration pursuant to WAC 242-03-830.⁷⁷
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24 ⁷⁷ Pursuant to RCW 36.70A.300 this is a final order of the Board. Reconsideration. Pursuant to WAC 242-03-
25 830, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original
26 and four copies of a motion for reconsideration, together with any argument in support thereof, should be filed with
27 the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration
28 directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document
29 at the Board office. RCW 34.05.010(6), WAC 242-03-240(1). The filing of a motion for reconsideration is not a
30 prerequisite for filing a petition for judicial review. Judicial Review. Any party aggrieved by a final decision of the
31 Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial
32 review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05
RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed
with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty
days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished
in person or by mail, but service on the Board means actual receipt of the document at the Board office within
thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by
electronic mail. Service. This Order was served on you the day it was deposited in the United States mail. RCW
34.05.010(19)

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